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# In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1239

YOUNG AND CO., ET AL., PETITIONERS

*v.*

R. J. SHEA, DEPUTY COMMISSIONER, UNITED STATES DEPARTMENT OF LABOR, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## BRIEF FOR THE RESPONDENT DEPUTY COMMISSIONER IN OPPOSITION

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1C–10C) is reported at 397 F.2d 185, and its opinion on joint petition for rehearing en banc (Pet. App. 11C–14C) is reported at 404 F.2d 1059. The docket entry of the district court (Pet. App. 1B) is unreported.

### JURISDICTION

The judgment of the court of appeals was entered on July 10, 1968. Motions for rehearing were denied on August 19, 1968, December 9, 1968, and December 12, 1968. By order dated March 6, 1969, Mr. Jus-

tice Black extended the time for filing a petition for a writ of certiorari until April 11, 1969, and the petition was filed on April 8, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Whether the courts below properly sustained the Deputy Commissioner's ruling that an adverse jury verdict in a longshoreman's negligence and unseaworthiness suit does not bar recovery under the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. 901, *et seq.*).[1]

## STATUTE INVOLVED

The relevant provisions of the Longshoremen's and Harbor Workers' Compensation Act are set forth in the Appendix, *infra*, pp. 11–13.

## STATEMENT

1. Paul Tugwell, a longshoreman employed by Young and Co.,[2] brought suit in the United States District Court for the Southern District of Texas against the owner of the *M/S Pleasantville*, alleging that he was injured while working aboard the ship on July 12, 1958, that the owner was negligent, and that the vessel was unseaworthy. The owner then impleaded Young and Co. When the case was submitted to the jury, a verdict was returned against Tugwell,

[1] The same question is presented in No. 1254, O.T., 1968, *Strachan Shipping Co., et al.* v. *Shea, Deputy Commissioner, et al.*

[2] Petitioners here are (1) the employer, Young and Co. and (2) its workmen's compensation insurance carrier.

with the jury answering the following special interrogatory in the negative:

> Did the plaintiff, Paul L. Tugwell, sustain an injury by slipping and falling upon the deck of the M/S PLEASANTVILLE during the early morning hours of July 12, 1958?

The court of appeals affirmed the judgment against Tugwell, *Tugwell* v. *A. F. Klaveness & Co.*, 320 F. 2d 866 (C.A. 5), and certiorari was denied, 376 U.S. 951.

2. Tugwell separately sought compensation benefits under the Longshoremen's and Harbor Workers' Compensation Act for the injury which had formed the basis for his lawsuit. After an administrative hearing, the respondent Deputy Commissioner concluded that he was not bound by the jury verdict and found on the basis of the administrative record that on July 12, 1958, Tugwell,

> * * * while performing service as a longshoreman for the employer [petitioner Young and Co.] aboard the "M/S PLEASANTVILLE" upon the navigable waters of the United States, sustained injury resulting in disability. While tightening a guy line he slipped and fell on the deck of the vessel, causing injury and strain to the lower part of his back. (Pet. App. 1A).

Tugwell was accordingly found to have been entitled to the compensation benefits he had been paid following the accident, but since there had been no showing of a loss of prospective earning power, the Deputy Commissioner found no additional benefits payable. Tugwell's file thus was ordered "closed", subject to the limitations of the Act. (Pet. App. 3A–5A).

Pursuant to Section 21(b) of the Act, 33 U.S.C. 921(b), petitioners then brought this action in the United States District Court for the Southern District of Texas, challenging the compensation order as not "in accordance with law." The district court rejected their reliance on the earlier jury verdict and sustained the award. The court of appeals affirmed, 397 F. 2d 185, and various petitions for rehearing and rehearing *en banc* were denied.

## ARGUMENT

Despite petitioners' contentions, there can be no real doubt, as the court below held, that the necessary elements for invoking the doctrine of collateral estoppel are not present in this case. Furthermore, application of collateral estoppel here would be contrary to the explicit congressional policy of assigning to the Deputy Commissioner full responsibility for resolving factual disputes concerning compensation claims under the Act.

1. A party may be collaterally estopped only with respect to "issues actually litigated and determined in the prior suit." *Lawlor* v. *National Screen Service Corp.*, 349 U.S. 322, 326. A settled corollary of this rule is that the doctrine will not apply if in the former proceeding a higher standard of proof was applicable or if the party against whom the defense is raised did not have the benefit of favorable presumptions available to him in the second type of proceeding. Thus, for example, acquittal on a criminal charge does not bar a subsequent civil action based on the same alle-

gations. See, *e.g.*, *United States* v. *Real Estate Boards,* 339 U.S. 485; *Helvering* v. *Mitchell,* 303 U.S. 391.

The Longshoremen's and Harbor Workers' Act, in furtherance of the Congressional purpose to "furnish a prompt, continuous, expert and inexpensive method" of providing administrative compensation benefits for injured longshoremen, *Crowell* v. *Benson,* 285 U.S. 22, 46, expressly confers on the Deputy Commissioner "full power and authority to hear and determine all questions" concerning compensation claims. 33 U.S.C. 919(a). He is an expert and can make his own investigations (33 U.S.C. 919(c)) and is not "bound by common law or statutory rules of evidence or by technical or formal rules of procedure" (33 U.S.C. 923(a)). He is directed to "make such investigation or inquiry or conduct such hearing in such manner as to best ascertain the rights of the parties." *Ibid.*

The purpose of the Act is to assure that every longshoreman injured on the job, regardless of fault, shall receive adequate compensation for his injuries. *Voris* v. *Eikel,* 346 U.S. 328. Congress intended that the burden of possible errors in granting compensation to longshoremen should be borne by the industry. *Baltimore and Philadelphia Steam Boat Co.* v. *Norton,* 284 U.S. 408, 414; *J. V. Vozzolo, Inc.* v. *Britton,* 377 F. 2d 144, 147 (C.A.D.C.); *F. H. McGraw & Co.* v. *Lowe,* 145 F. 2d 886, 888 (C.A. 2). As a manifestation of this policy, Congress has expressly created a series of presumptions running in the claimant's favor, which may be overcome only if there is "substantial evidence to the contrary." 33 U.S.C. 920. Therefore,

as the court below correctly pointed out, the federal courts have consistently held that the Deputy Commissioner "operates under the statutory policy that all doubtful fact questions are to be resolved in favor of the injured employee or his dependent family." 397 F. 2d 188. *J. V. Vozzolo, Inc.* v. *Britton, supra,* 377 F. 2d at 147; *Howell* v. *Einbinder,* 350 F. 2d 442 (C.A.D.C.); *Friend* v. *Britton,* 220 F. 2d 820 (C.A. D.C.); *F. H. McGraw & Co.* v. *Lowe,* 145 F. 2d 886 (C.A. 2); *Bernatowicz* v. *Nacirema Operating Co.,* 142 F. 2d 385 (C.A. 3).

In view of these considerations, the court of appeals correctly noted that a compensation claimant may be found entitled to compensation benefits even if he was unable to meet the burden of persuasion in a civil suit arising out of the same incident. 397 F. 2d at 188, 404 F. 2d at 1062.

Contrary to petitioners' assertions (Pet. 11, 24, 28), the decision below does not conflict with the Second Circuit's opinion in *John W. McGrath Corp.* v. *Hughes,* 264 F. 2d 314.[3] It is difficult to understand how that case could be in conflict with this one. The court there *affirmed* an award of compensation, finding that it was

[3] Petitioners also contend that the decision in this case conflicts with another decision by the court below, *Calbeck* v. *Strachan Shipping Co.*, 306 F. 2d 693 (C.A. 5), certiorari denied, *sub nom. Gee* v. *Strachan Shipping Co.*, 372 U.S. 954. An alleged inconsistency within a circuit need not occasion the exercise of this Court's certiorari jurisdiction, but we note in any event that *Strachan Shipping* involved facts and issues quite distinguishable from the case at bar. Significantly, no judge of the Fifth Circuit even requested a poll of his colleagues on whether the court *en banc* should have reheard the present case (see Pet. App. 11C).

supported by substantial evidence. Insofar as petitioners rely on this decision for its formulation of the test of judicial review under the Administrative Procedure Act (Pet. 24), their reliance is misplaced. The court below did not dispute, and we do not deny, that awards under the Longshoremen's Act must be supported by substantial evidence on the record as a whole. *Banks* v. *Chicago Grain Trimmers,* 390 U.S. 459, 467. It does not follow, however, that the burden of persuasion before the Deputy Commissioner is as great as it is before a jury. To the contrary, as noted above, where the evidence is in balance a jury is required to find for the defendant, but by virtue of the various statutory presumptions in favor of a claim under the Longshoremen's Act, and in light of the evident "humanitarian nature" of the Act, *O'Keeffe* v. *Smith, Hinchman & Grylls Associates,* 380 U.S. 359, 362, the Deputy Commissioner must resolve marginal fact questions in favor of the compensation claimant. The courts below thus correctly held that a prior jury verdict is not conclusive on the Deputy Commissioner in compensation hearings under the Longshoremen's and Harbor Workers' Compensation Act.

Nothing in the Administrative Procedure Act calls for a different result. That Act certainly cannot be interpreted as having repealed, by implication, the statutory presumptions long established in favor of claimants by the Longshoremen's Act. Indeed, Section 7 of the Administrative Procedure Act, as amended (5 U.S.C. (Supp. II) 556(d)), specifically provides

that general rules as to burden of proof apply "[e]xcept as otherwise provided by statute." The general provisions of the APA, therefore, did not supersede the well-established and carefully developed standards applicable under the Longshoremen's Act.

2. There is a further substantial reason why the Deputy Commissioner properly refused to allow a verdict in a civil proceeding to pre-empt his decision. The Longshoremen's Act was designed "to furnish a prompt continuous, expert and inexpensive method of dealing with a class of questions of fact which are peculiarly suited to examination and determination by an administrative agency specially assigned to that task." *Crowell* v. *Benson, supra,* 285 U.S. at 46. The Deputy Commissioner has been granted exclusive jurisdiction to "hear and determine all questions in respect of" compensation claims, 33 U.S.C. 919, and in doing so he is not "bound by common law or statutory rules of evidence or by technical or formal rules of procedure", 33 U.S.C. 923. The Deputy Commissioner may not be foreclosed from making that determination by prior judicial proceedings. See *Leonard* v. *Liberty Mutual Ins. Co.,* 267 F. 2d 421 (C.A. 3); *Thibodeaux* v. *J. Ray McDermott & Co.,* 276 F. 2d 42, 48–51 (C.A. 5); *Paschal* v. *Lykes Bros. S.S. Co.,* 264 F. Supp. 836 (S.D. Tex.); *Associated-Banning Co.* v. *Landy,* 254 F. Supp. 275 (N.D. Calif.). Application of the doctrines of *res judicata* and collateral estoppel would unjustifiably deprive the Deputy Commissioner of his exclusive statutory responsibility to "hear and determine all questions" with respect to compensation

claims. 33 U.S.C. 919(a). See 2 Davis, *Administrative Law,* § 18.11, p. 619. As the Court of Appeals for the District of Columbia Circuit explained in a similar context:

> Where the application of the judicial doctrine *res judicata* would be inconsistent with the method devised by Congress the doctrine will not be enforced by the courts. *Kalb* v. *Feurstein,* 1940, 308 U.S. 433, 444 * * *. It is for this reason we hold against the contention of [the union] and not because of lack of any of the elements which usually make out a case for the application of *res judicata.* The doctrine is not to be used where the circumstances create a semblance of conditions for its application but to apply it would submerge the plan of Congress for the administration and enforcement of its policy.

*Denver Building and Constr. Tr. Co.* v. *National Labor Relations Board,* 186 F. 2d 326, 332.[4] See, also, *Cream Top Creamery* v. *Dean Milk Co.,* 383 F. 2d 358 (C.A. 6); *Lyons* v. *Westinghouse Electric Corp.,* 222 F. 2d 184 (C.A. 2), certiorari denied *sub nom. Walsh* v. *Lyons,* 350 U.S. 825. In addition, since the Deputy Commissioner is not bound by his own prior findings, see 33 U.S.C. 922; *Banks* v. *Chicago Grain Trimmers,* 390 U.S. 459, it would be anomalous indeed to conclude that findings in a separate type of action foreclosed independent inquiry.

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[4] Although this Court reversed on the merits, 341 U.S. 675, it specifically approved the court of appeals' view that *res judicata* was inapplicable. 341 U.S. at pp. 681–683.

The courts below correctly held that the Deputy Commissioner was not bound by the jury verdict. Further review is not warranted.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1969.

## APPENDIX

The Longshoremen's and Harbor Workers' Compensation Act provides in pertinent part:

(Section 19, 33 U.S.C. 919)

PROCEDURE IN RESPECT OF CLAIMS.

(a) * * * a claim for compensation may be filed with the deputy commissioner * * * and the deputy commissioner shall have full power and authority to hear and determine all questions in respect of such claim.

* * * * *

(Section 20, 33 U.S.C. 920)

PRESUMPTIONS.

In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of substantial evidence to the contrary—

(a) That the claim comes within the provisions of this chapter.

(b) That sufficient notice of such claim has been given.

(c) That the injury was not occasioned solely by the intoxication of the injured employee.

(d) That the injury was not occasioned by the willful intention of the injured employee to injure or kill himself or another.

(Section 21, 33 U.S.C. 921)

REVIEW OF COMPENSATION ORDERS.

* * * * *

(b) If not in accordance with law, a compensation order may be suspended or set aside, in

whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest against the deputy commissioner making the order * * *.

* * * * *

(Section 22, 33 U.S.C. 922)

MODIFICATION OF AWARDS.

Upon his own initative, or upon the application of any party in interest, on the ground of a change in conditions or because of a mistake in a determination of fact by the deputy commissioner, the deputy commissioner may, at any time prior to one year after the date of the last payment of compensation, whether or not a compensation order has been issued, or at any time prior to one year after the rejection of a claim, review a compensation case in accordance with the procedure prescribed in respect of claims in section 919 of this title, and in accordance with such section issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation. * * *

(Section 23, 33 U.S.C. 923)

PROCEDURE BEFORE THE DEPUTY COMMISSIONER.

(a) In making an investigation or inquiry or conducting a hearing the deputy commissioner shall not be bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this chapter; but may make such investigation or inquiry or conduct such hearing in such manner as to best ascertain the rights of the parties. * * *

* * * * *

(Section 33, 33 U.S.C. 933)

COMPENSATION FOR INJURIES WHERE THIRD PERSONS ARE LIABLE.

(a) If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer or a person or persons in his employ is liable in damages, he need not elect whether to receive such compensation or to recover damages against such third person.

(b) Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such award.

* * * * *

U.S. GOVERNMENT PRINTING OFFICE: 1969

# BRIEF IN OPPOSI-
# TION TO PETITION
# FOR A WRIT OF
# CERTIORARI

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM

1968

NO. 1239

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YOUNG & CO., ET AL.
Petitioners

v.

R. J. SHEA, DEPUTY COMMISSIONER,
UNITED STATES DEPARTMENT OF LABOR,
ET AL.
Respondents

---

# BRIEF FOR THE RESPONDENT PAUL L. TUGWELL IN OPPOSITION

---

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---

# BRIEF FOR THE RESPONDENT PAUL L. TUGWELL IN OPPOSITION

## QUESTIONS PRESENTED

1. Did the courts below correctly refuse to apply the doctrine of collateral estoppel to the longshoreman's claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act where the longshoreman had previously in a claim based upon the same alleged injuries failed to secure a favorable jury finding in a third party action against the vessel owner tried under the Federal Rules of Civil Procedure? (The same question (under a somewhat different background) is presented in No. 1254 October Term, 1968, styled Strachan Shipping Co. et al vs. Shea, Deputy Commissioner et al; however, in that case the injured longshoreman has filed a petition for writ of certiorari in Cause No. 1311, October Term, 1968, styled Lester Nehring vs. Empresa Lineas Maritimas Argentinas vs. Strachan Shipping Co., raising certain questions concerning the trial of the third party case, which petition, if granted and reversal had would presumably render moot the question raised in No. 1254.)

2. Does the petitioners asserted constitutional question of due process exist in this case?

## STATUTES AND RULES INVOLVED

The statutes and rules involved are as follows: Rule 43, 49, 59, and 60, Federal Rules of Civil Procedure, 33 U.S.C. 914(a)(b)(c)(d), 919(a)(c), 922, 929, 930 and 5 U.S.C. 556 formerly 1006 set out in appendix.

## STATEMENT

Respondent Tugwell in general adopts the statement of the case as made by the deputy commissioner but to this would add, that the third party action by Tugwell referred to by the deputy commissioner was tried under the Federal Rules of Civil Procedure in which trial the admissible evidence was determined by Rule 43, Federal Rules of Civil Procedure, pages 5a-7a, appendix; whereas this cause for compensation was tried in an administrative hearing before the deputy commissioner under the Longshoremen's and Harbor Workers' Compensation Act; in the trial of the claim under the Longshoremen's and Harbor Workers' Compensation Act, the deputy commissioner was given full power and authority to hear and determine all questions in respect to the claim (see 33 U.S.C. 919(a), page 12a, appendix) and the deputy commissioner was directed to make such investigation as he considered necessary in respect to the claim for compensation (see 33 U.S.C. 919(c), page 12a, appendix). The jury was not authorized or directed to make an investigation into the facts.

## ARGUMENT

### Question No. 1

Respondent Tugwell contends that the case was correctly decided below; he expressly adopts the argument of the deputy commissioner and attempts to avoid repetition of what is said there, by so doing.

The procedural rules under which the two different proceedings were tried are different and the fact finders are changed under the law with different duties, as to essentially the same facts; the different duties, when exercised under the applicable law results in many cases in different results. The jury has no power to make an investigation into the merits of the case tried before it, but only to decide the issues submitted under Rule 49, Federal Rules of Civil Procedure, 8a appendix; whereas the deputy commissioner is authorized and directed under 33 U.S.C. 919(c), supra, to make or cause to be made such investigations into the claim as he considers necessary. It, no doubt, would be reversible error for the jury in a civil case to attempt to make or cause to be made such an investigation as they might consider necessary as congress has directed the deputy commissioner to do. The jury is dependent for their knowledge upon such facts as the parties may offer evidence before them under Rule 43, Federal Rules of Civil Procedure and they are sworn by their oaths as jurors to decide the case under such evidence as admitted for their consideration by the court; whereas the deputy commissioner is directed by congress to find the facts from his own investigation, if necessary. The matter of a new trial or rehearing in the jury case are matters to be determined by Federal Rules of Civil Procedure, Rule 59 and 60, pages 1a - 4a, appendix. Whereas, in the longshoreman's case for compensation under the Longshoremen's and Harbor Workers' Compensation Act

the deputy commissioner may on his own motion (see 33 U.S.C. 922, page 13a, appendix) upon a change of condition or mistake in fact (mistake in fact includes the matter of occurrence of injury, see Banks vs. Chicago Grain Trimmers, 390 US 459, pages 464-465), even though the mistake was induced by the longshoreman himself by failing to offer evidence known by him to exist at the time of an earlier hearing, see Stanfield v. Lykes Bros. S.S. Co., 5th Circuit, 124 $F_2$ 999,1004; under Federal Rules of Civil Procedure 60(b) his burden to obtain relief from the judgment would be much greater. So no matter what words are used to describe the differences between the two hearings the burden on the longshoreman is much less before the deputy commissioner than before the jury and if a mistake is made or change of condition occurs, either side may obtain prompt relief.

The exclusive jurisdiction to determine all matters relating to compensation which would include the matter of injury has been placed by congress in the hands of the deputy commissioner under 33 U.S.C. 919(a), supra. If petitioners view were to prevail this would likely work havoc in the operation of the Longshoremen's and Harbor Workers' Compensation Act insofar as a self executing part of the same is considered, (see 33 U.S.C. 914, page 10a, appendix). Under the statutory scheme, unless the employer controverts the right to compensation under 33 U.S.C. 914(d), he is required to commence payment of compensation on the 14th day

after the employer has knowledge of the injury which he did in this case, without a formal order or hearing. If the longshoreman is faced with the prospect of collateral estoppel by reason of an adverse jury verdict, even though the employer would not ordinarily, infra, contest the question of injury before the deputy commissioner, prudent handling of his litigation would require him to secure a hearing before the deputy commissioner and entry of a formal order from the deputy commissioner in almost every case to the effect that the longshoreman had sustained the injury on the occassion claimed even though the employer was proceeding with the payment of compensation under 33 U.S.C. 914(c) thereby creating an excessive workload on the deputy commissioner's office and would materially and adversely affect the self executing phase of the Longshoremen's and Harbor Workers' Compensation Act. Most likely this would result in the need of additional deputy commissioners and/or delay. As a practical matter under the present arrangement, the employer seldom controverts the occurrence of the injury before the deputy commissioner and usually commences the payment of compensation without his intervention and if problems arise, they are usually handled by informal conference. The employer is under civil penalty to keep a record of all injuries to his employees, 33 U.S.C. 929, page 15a, appendix, and make a report of all injuries to his employees to the deputy commissioner, see 33 U.S.C. 930, page 16a, appendix; whereas the

employer seldom controverts the matter of injury before the deputy commissioner, both the employer and vessel owner customarily and except in the most serious and obvious cases deny the occurrence of the injury in the third party case against the vessel owner and collaborate to defeat the injured longshoreman's suit, even to the extent of not following the spirit of the trial courts instructions, for an example see Rogers v. DeVries & Co. 236 FS 110.

The result reached by the deputy commissioner is buttressed as being correct for the reason that the deputy commissioner had before him the fact that the injury was immediately reported to its authorized employees who could view first hand the cause and effects of the alleged fall, the admissions of the employer and insurance carrier in voluntarily furnishing medical attention, paying compensation for several months and was properly evidence to be considered by the deputy commissioner as admissions against interest as against the employer and insurance carrier whereas such matters would not have been properly admissible as against the vessel owner in the third party action, against whom the finding of injury had to be secured in the third party action and further whereas the injury was promptly reported to the employer in accordance with accepted practices; accepted practices as to Tugwell did not require the prompt reporting of the injury to the third party and it was not reported by him to

the third party, so as a practical matter different cases were tried before the different tribunals.

Question No. 2

Notwithstanding the claimed due process clause violation, it simply does not realistically exist. It can only be contended for under an extreme construction of the lower courts ruling, where one is seeking to see if possibly a ruling could conflict with a constitutional provision as distinguished from determining if the ruling can be met on some other grounds. The courts do not decide cases on constitutional grounds unless they cannot be decided on non-constitutional grounds, see Communist Party v. Subversive Activities Control Board, 351 U.S. 115, 76 S. Ct. 663,667. There was no disqualifying affidavit filed as to any alleged bias or prejudice of the deputy commissioner as required by the Administrative Procedures Act, see 5 U.S.C. 556, formerly 1006, page 18a, appendix, if the claim is made that the deputy commissioner was biased or prejudiced.

However, the claim seems to be that the construction placed the statute creates the violation of the due process clause; that it should be construed and applied without regard to accomplishing the beneficial effects intended to be accomplished by the statute; in other words, the contention seems to be that due process requires mathematical certainty, which is not required, see Gibbs v. Burke, 69 S. Ct. 1247, 1249, 337 U.S.

775, 776 (dealing with the 14th amendment - Due Process Clause). Due Process means different things against different backgrounds,. "... Due process of law is secured against invasion by the federal Government by the Fifth Amendment and is safeguarded against state action in identical words by the Fourteenth. The phrase formulates a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights. Its application is less a matter of rule. Asserted denial is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, fall short of such denial. In the application of such a concept there is always the danger of falling into the habit of formulating the guarantee into a set of hard and fast rules the application of which in a given case may be to ignore the qualifying factors therein disclosed. See Betts v. Brady 316 U.S. 455,462; 62 S. Ct. 1252, 1256, overruled on other grounds by Gideon v. Wainwright 372 U.S. 335; 83 S. Ct. 792, but substantially followed as to the above quote.

The courts below, as indicated by cases cited in the opinion, as well as supported by cases cited by the deputy commissioner in his brief in opposition, insofar as the matters raised by petitioners are concerned, have followed the dictates of this court in requiring a liberal construction of the Longshoremen'

and Harbor Workers' Compensation Statute in order to achieve its beneficial purposes and it is believed that petition should be denied.

WHEREFORE, premises considered, Respondent Tugwell prays that the petition for writ of certiorari be denied.

Respectfully submitted,

(ORIGINAL SIGNED) W. JILES ROBERTS

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CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Brief of Respondent Paul L. Tugwell in Opposition to the petition have been served upon each of the following: Solicitor General, Department of Justice, Washington, D. C., 20530; Solicitor of Labor, Washington, D. C. 20530, each by depositing two (2) copies in a United States Post Office or mailbox addressed to their post office address, airmail, postage prepaid; and upon Mr. Anthony J. P. Farriss, United States Attorney, 515 Rusk Avenue, Houston, Texas 77002, counsel for Respondent, R. J. Shea, Deputy Commissioner; and Mr. E. D. Vickery, Royston, Rayzor & Cook, 877 San Jacinto Building, Houston, Texas 77002, counsel for Petitioners Texas Employers' Insurance Association and Young & Company, by depositing in a United States Post Office or mailbox the same to each of them, United States Mail, postage prepaid, properly addressed to each of them at their respective post offices addresses, this the 17 day of May, 1969.

(ORIGINAL SIGNED) W. JILES ROBERTS

W. JILES ROBERTS

Federal Rules of Civil Procedure, Rule 59. New Trials; Amendment of Judgments

(a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

(b) Time for Motion. A motion for a new trial shall be served not later than 10 days after the entry of the judgment.

(c) Time for Serving Affidavits. When a motion for new trial is based upon affidavits they shall be served with the motion. The opposing party has 10 days after such service within which to serve opposing affidavits, which period may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

(d) On Initiative of Court. Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party. After giving the parties notice and an opportunity to be heard on the matter, the court may grant a motion for a new trial, timely served, for a reason not stated in the motion. In either case, the court shall specify in the order the grounds therefor. As amended Feb. 28, 1966, eff. July 1, 1966.

(e) Motion to Alter or Amend a Judgment. A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment. As amended Dec. 27, 1946, eff. March 19, 1948.

Federal Rules of Civil Procedure, Rule 60. Relief from Judgment or Order.

(a) Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any

other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action. As amended Dec. 27, 1946, eff. March 19, 1948; Dec. 29, 1958, eff. Oct. 20, 1949.

Federal Rules of Civil Procedure, Rule 43. Evidence.

(a) Form and Admissibility. In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by these rules. All evidence shall be admitted which is admissible under the statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court is held. In any case, the statute or rule which favors the reception of the evidence governs and the evidence shall be presented according to the most convenient method prescribed in any of the statutes or rules to which reference is herein made. The competency of a witness to testify shall be determined in like manner.

(b) Scope of Examination and Cross-Examination. A party may interrogate any unwilling or hostile witness by leading questions. A party may call an adverse party or an officer, director, or managing agent of a public or private corporation or of a partnership or association which is an adverse party, and interrogate him by leading questions and contradict and impeach him in all respects as if he had been called by the adverse party, and the witness thus called may be contradicted and impeached by or on behalf of the adverse party also, and may be cross-examined by the

adverse party only upon the subject matter of his examination in chief.

(c) Record of Excluded Evidence. In an action tried by a jury, if an objection to a question propounded to a witness is sustained by the court, the examining attorney may make a specific order of what he expects to prove by the answer of the witness. The court may require the offer to be made out of the hearing of the jury. The court may add such other or further statement as clearly shows the character of the evidence, the form in which it is offered, the objection made, and the ruling thereon. In actions tried without a jury the same procedure may be followed, except that the court upon request shall take and report the evidence in full, unless it clearly appears that the evidence is not admissible on any ground or that the witness is privileged.

(d) Affirmation in Lieu of Oath. Whenever under these rules an oath is required to be taken, a solemn affirmation may be accepted in lieu thereof.

(e) Evidence on Motions. When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or depositions.

(f) Interpreters. The court may appoint an interpreter of its own selection and may fix his reasonable compensa-

tion. The compensation shall be paid out of funds provided by law or by one or more of the parties as the court may direct, and may be taxed ultimately as costs, in the discretion of the court. Added Feb. 28, 1966, eff. July 1, 1966.

Federal Rules of Civil Procedure, Rule 49. Special Verdicts and Interrogatories.

(a) Special Verdicts. The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

(b) General Verdict Accompanied by Answer to Interrogatories. The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such explanation or instruction as

may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict. When the general verdict and the answers are harmonious, the court shall direct the entry of the appropriate judgment upon the verdict and answers. When the answers are consistent with each other but one or more is inconsistent with the general verdict, the court may direct the entry of judgment in accordance with the answers, notwithstanding the general verdict or may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with the general verdict, the court shall not direct the entry of judgment but may return the jury for further consideration of its answers and verdict or may order a new trial.

33 U.S.C. 914. Payment of Compensation.

(a) Compensation under this chapter shall be paid periodically, promptly, and directly to the person entitled thereto, without an award, except where liability to pay compensation is controverted by the employer.

(b) The first installment of compensation shall become due on the fourteenth day after the employer has knowledge of the injury or death, on which date all compensation then due shall be paid. Thereafter compensation shall be paid in installments, semimonthly, except where the deputy commissioner determines that payment in installments should be made monthly or at some other period.

(c) Upon making the first payment, and upon suspension of payment for any cause, the employer shall immediately notify the deputy commissioner, in accordance with a form prescribed by the Secretary, that payment of compensation has begun or has been suspended, as the case may be.

(d) If the employer controverts the right to compensation he shall file with the deputy commissioner on or before the fourteenth day after he has knowledge of the alleged injury or death, a notice, in accordance with a form prescribed by the Secretary, stating that the right to compensation is controverted, the name of the claimant, the name of the employer, the date of the alleged injury

or death, and the grounds upon which the right to compensation is controverted.

Remaining portions of 33 U.S.C. 914 not pertinent to this case.

33 U.S.C. 919. Procedure in Respect of Claims.

(a) Subject to the provisions of section 913 of this title a claim for compensation may be filed with the deputy commissioner in accordance with regulations prescribed by the Secretary at any time after the first seven days of disability following any injury, or at any time after death, and the deputy commissioner shall have full power and authority to hear and determine all questions in respect of such claim.

(c) The deputy commissioner shall make or cause to be made such investigations as he considers necessary in respect to the claim, and upon application of any interested party shall order a hearing thereon. If a hearing on such claim is ordered the deputy commissioner shall give the claimant and other interested parties at least ten days' notice of such hearing, served personally upon the claimant and other interested parties or sent to such claimant and other interested parties by registered mail, and shall within twenty days after such hearing is had, by order, reject the claim or make an award in respect of the claim. If no hearing is ordered within twenty days after notice is given as provided in subdivision (b) of this section, the deputy commissioner shall, by order, reject the claim or make an award in respect of the claim.

33 U.S.C. 922. Modification of awards.

Upon his own initiative, or upon the application of any party in interest, on the ground of a change in conditions or because of a mistake in a determination of fact by the deputy commissioner, the deputy commissioner may, at any time prior to one year after the date of the last payment of compensation, whether or not a compensation order has been issued, or at any time prior to one year after the rejection of a claim, review a compensation case in accordance with the procedure prescribed in respect of claims in section 919 of this title, and in accordance with such section issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation. Such new order shall not affect any compensation previously paid, except that an award increasing the compensation rate may be made effective from the date of the injury, and if any part of the compensation due or to become due is unpaid, an award decreasing the compensation rate may be made effective from the date of the injury, and any payment made prior thereto in excess of such decreased rate shall be deducted from any unpaid compensation, in such manner and by such method as may be determined by the deputy commissioner with the approval of the Secretary. Mar. 4, 1927, c. 509, 22, 44 Stat. 1437; May 26, 1934, c. 354, 5, 48 Stat. 807; June 25, 1938, c. 685, 10, 52 Stat. 1167; 1946 Reorg. Plan No. 2, 3, eff. July 16, 1946, 11 F.R. 7873, 60

Stat. 1095; 1950 Reorg. Plan No. 19, 1, eff. May 24, 1950, 15 F.R. 3178, 64 Stat. 1271.

33 U.S.C. 929. Record of Injury or Death.

Every employer shall keep a record in respect of any injury to an employee. Such record shall contain such information of disease, other disability, or death in respect of such injury as the Secretary may by regulation require, and shall be available to inspection by the Secretary or by any State authority at such times and under such conditions as the Secretary may by regulation prescribe. Mar. 4, 1927, c. 509, 28, 44 Stat. 1438; 1946 Reorg. Plan No. 2, 3, eff. July 16, 1946, 11 F.R. 7873, 60 Stat 1095; 1950 Reorg. Plan No. 19, 1, eff. May 24, 1950, 15 F.R. 3178, 64 Stat. 1271.

33 U.S.C. 930. Reports.

(a) Within ten days from the date of any injury or death or from the date that the employer has knowledge of a disease or infection in respect of such injury, the employer shall send to the Secretary a report setting forth (1) the name, address, and business of the employer; (2) the name, address, and occupation of the employee; (3) the cause and nature of the injury or death; (4) the year, month, day, and hour when and the particular locality where the injury or death occurred; and (5) such other information as the Secretary may require. A copy of such report shall be sent at the same time to the deputy commissioner in the compensation district in which the injury occurred.

(b) Additional reports in respect of such injury and of the condition of such employee shall be sent by the employer to the Secretary and to such deputy commissioner at such times and in such manner as the Secretary may prescribe.

(c) Any report provided for in subdivision (a) or (b) of this section shall not be evidence of any fact stated in such report in any proceeding in respect of such injury or death on account of which the report is made.

(d) The mailing of any such report and copy in a stamped envelope, within the time prescribed in subdivisions (a) or (b) of this section, to the Secretary and deputy commissioner, respectively, shall be a compliance with this section.

(e) Any employer who fails or refuses to send any report required of him by this section shall be subject to a civil penalty not to exceed $500 for each such failure or refusal.

(f) Where the employer or the carrier has been given notice, or the employer (or his agent in charge of the business in the place where the injury occurred) or the carrier has knowledge, of any injury or death of an employee and fails, neglects, or refuses to file report thereof as required by the provisions of subdivision (a) of this section, the limitations in subdivision (a) of section 913 of this title shall not begin to run against the claim of the injured employee or his dependents entitled to compensation, or in favor of either the employer or the carrier, until such report shall have been furnished as required by the provisions of subdivision (a) of this section. Mar. 4, 1927, c. 509, 30, 44 Stat. 1439; June 25, 1938, c. 685, 11, 52 Stat. 1167; 1946 Reorg. Plan No. 2, 3, eff. July 16, 1946, 11 F.R. 7873, 60 Stat. 1095; 1950 Reorg. Plan No. 19, 1, eff. May 24, 1950, 15 F.R. 3178, 64 Stat. 1271.

5 U.S.C. 556. Formerly 1006. Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision

..... On the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee, the agency shall determine the matter as a part of the record and decision in the case. .....